BRF124

86-1580

NO. _____

Supreme Court, U.S.
FILED
MAR 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROBERTO ANTONIO GONZALEZ-CALLES,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH A. CONNORS III
Counsel of Record
804 Pecan Blvd.
McAllen, Texas 78502-5838
(512) 687-8217

ATTORNEY FOR PETITIONER

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TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2389

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERTO ANTONIO GONZALEZ-CALLES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING
(January 26, 1987)

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen Randall
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2389

D.C. Docket No. CR-B-86-049

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERTO ANTONIO GONZALEZ-CALLES,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, RANDALL, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 17, 1986

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2389

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERTO ANTONIO GONZALEZ-CALLES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
(D. C. No. CR-B-86-049)

(December 17, 1986)

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Roberto Antonio Gonzalez-Calles ("appellant") appeals his conviction for importation of cocaine and possession of cocaine with intent to distribute it and for conspiracy to import and possess cocaine with intent to distribute it. For the reasons that follow, we affirm.

I.

On January 18, 1986, shortly after 5:00 p.m., appellant and his brother arrived at the public airport in McAllen, Texas aboard a 1972 Cessna Skywagon Model 185, a single-engine airplane. Appellant was the pilot of the plane, and his brother was a passenger. Appellant and his brother disembarked, and brought their luggage to customs for inspection. They made a negative declaration, claiming that they were not bringing anything into the United States.

While appellant and his brother were in the customs office, customs agent Louis D. Hall boarded the plane with his dog, Royker, which was trained to detect narcotics, to conduct a search of the plane. Royker indicated that drugs were present in the plane, and customs agents Andreas Funk and Thomas J. DeMichelle entered the plane to search it. After determining that no contraband was visible, agent DeMichelle noticed a hole in the rear bulkhead of the plane. Upon enlarging the hole and shining a flashlight inside, the agents were able to see plastic bags in the compartment behind the bulkhead. A knife was inserted into the hole, and a white powder was on the knife when it was withdrawn. This powder field tested positive for the presence of cocaine. The agents then removed the screws securing the bulkhead and discovered three large plastic bags, weighing approximately 125

pounds, and containing approximately 110 pounds net weight of cocaine. The bags were tested for fingerprints, and some were obtained, but these did not match the fingerprints of either appellant or his brother.

After the discovery of the cocaine, appellant and his brother were arrested and advised of their Miranda rights. Appellant made statements to the effect that he did not know that the cocaine was in the airplane. Appellant claimed that the airplane belonged to Victor, another of his brothers, who intended to sell it, and that he was taking it to Hobby airport in Houston for repairs. Appellant had letters in his possession authorizing him to take the airplane to Houston for repairs, as well as $700 in cash, supposedly for his expenses in doing so.

Appellant and his brother were indicted on four counts. Count one charged conspiracy to import cocaine, in violation of 21 U.S.C. §§ 952(a), 960 (b)(1), and 963. Count two charged importation of cocaine, in violation of 21 U.S.C. §§ 952(a) and 960(b)(1), and 18 U.S.C. §2. Count three charged conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Count four charged possession of cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. As returned by the grand jury, count two contained a typographical error. While count two should have charged importation of cocaine, it erroneously charged importation of marihuana. With the consent of the defendant, the word "marihuana" was deleted and the word "cocaine" was interlineated.

Appellant and his brother were tried before a jury. As both sides concede on appeal, the principal issue in the case was whether appellant had knowledge that the cocaine was in the concealed compartment. It was undisputed that the cocaine was not visible to the pilot, and that it did not emit an odor that was discernable to humans. The only evidence connecting appellant with the cocaine was the effect that the presence of that much cocaine in the storage compartment would have on the pitch of the airplane. The compartment in which the cocaine was found was a baggage compartment designed to hold 50 pounds. As stated above, the gross weight of the cocaine was 125 pounds, thus overloading the baggage compartment by 75 pounds. The government put on Louis L. Picciano, an experienced customs pilot, as an expert witness. He testified in response to a hypothetical

question that the amount of cocaine loaded in the airplane in question would require the pilot on take-off to adjust the trim of the airplane to compensate for the added weight in the tail of the plane. Hence, Picciano testified, the added weight would definitely call a pilot's attention to the fact that there was something in the rear baggage compartment.

At the close of the government's evidence, the district court granted appellant's brother's motion for a directed verdict of acquittal, but declined to grant appellant's similar motion. At the close of all of the evidence, appellant made a motion for a directed verdict of acquittal, which the district court also denied. The jury convicted appellant on all counts, and the court imposed sentence. Appellant was sentenced to ten years on each of the four counts, with the sentences to run

concurrently. At the imposition of sentence, the district court also imposed a special parole term of seven years on each of the substantive counts and an assessment of $50 on each count. Although the district court imposed the special parole term at sentencing, it was not included in the Judgment and Probation/Commitment Order signed by the district judge.

Appellant appeals to this court, alleging that a variety of errors warrant the reversal of his conviction. Specifically, appellant argues that (1) the evidence was insufficient to convict him on either the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it or the conspiracy counts; (2) the conspiracy convictions should be reversed because the only other known conspirator was acquitted and there was insufficient evidence from which the

jury could have concluded that appellant conspired with unknown others; (3) the error in the indictment could not legally be corrected by amendment, and therefore there was a fatal variance between the indictment and the proof as to count two; (4) the district court erred in instructing the jury that they could infer possession from the fact that a person had control over an airplane; (5) the district court erred in failing to give an instruction on knowledge requested by appellant; (6) reversible error occurred because of references by the prosecutor in his closing arguments to other acts of the appellant; and (7) the district court erred in imposing a special parole term. We address each of appellant's arguments in turn.

II.

A. Sufficiency of the Evidence:

Appellant's major argument in seeking a reversal of his convictions is that the evidence was insufficient to support the jury finding that he knowingly possessed the cocaine. The test this court employs in assessing the sufficiency of the evidence to support a conviction is well-settled:

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. The jury is free to choose among reasonable constructions of the evidence.

United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (footnote omitted), aff'd on other grounds, 462 U.S. 356 (1983). In applying this standard, "we must examine all the evidence and reasonable inferences in the light most favorable to

the government and determine whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Fortna, 796 F.2d 724, 740 (5th Cir.), cert. denied, 107 S. Ct. 437 (1986). "We recognize that possession may be actual or constructive, joint among several people and proved by circumstantial evidence." United States v. Moreno-Hinojosa, 804 F.2d 845, ____ (5th Cir. 1986). Although this is a close case, applying the above principles convinces us that the evidence was sufficient to convict appellant.

In addition to the expert testimony noted above that a pilot would definitely notice the added weight of the cocaine in the rear luggage compartment of the airplane, there was other evidence from which the jury could have found appellant guilty. There was evidence that appellant

misrepresented the numbers on his airplane when he filed his flight plan in Veracruz, Mexico.[1] Although appellant testified that the numbers that he supplied were those of another airplane that he was used to flying, the jury could easily have concluded that appellant simply lied about the airplane's numbers so as to avoid alerting United States Customs of the arrival of that particular airplane.[2] In response to questioning by the court, appellant testified that the service that was to be

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[1] The flight plan that appellant filed in Veracruz stated the registration number of the airplane as TBGAF, while the actual number painted on the airplane was TG-BEQ.

[2] Appellant testified that he was aware that the Mexican authorities would notify the McAllen airport of his arrival. Hence, the jury could well have concluded that appellant had intentionally misrepresented the registration numbers of the airplane, in order to confuse United States Customs, because he knew that the cocaine was in the airplane.

performed on the airplane in Houston could have been performed in El Salvador or Guatemala. Based upon this testimony, the jury could have concluded that appellant's story that he was delivering the airplane to Houston for pre-sale repairs and servicing was simply not credible. Furthermore, appellant arrived after 5:00 p.m., and admitted knowing that the airport customs office closed at 5:00. The jury could easily have believed the government's theory that appellant arrived after normal business hours in the hope that United States Customs would have only a reduced evening staff on duty and would therefore not search his airplane. Finally, when he was arrested, appellant had in his possession a letter from his brother, Victor, the owner of the airplane, which, in addition to giving appellant instructions as to who to deliver the airplane to in Houston and what service

the airplane needed, stated that Victor was "already on [his] way out to do some jobs of drilling for water at some town." Appellant, however, testified that Victor was with him in the morning on the day before his departure. Given this apparent inconsistency, the jury could have concluded that the letter was simply a precaution that would provide a legitimate excuse for the flight in the event that the cocaine was discovered. We conclude that the above evidence, when viewed in the light most favorable to the government, is sufficient for a jury to find appellant guilty beyond a reasonable doubt of knowingly importing cocaine and possessing cocaine with intent to distribute it.

In holding that the above evidence is sufficient to sustain appellant's conviction on the substantive possession and importation counts, we are reminded that

this court has sustained convictions in similar cases involving far less evidence to convict. See United v. Aguila-Reyes, 722 F.2d 155, 156-58 (5th Cir. 1983). In Aguila-Reyes, the defendant was the driver of a truck. The truck contained a factory-build compartment which was visible only from beneath the vehicle. Upon crossing the United States-Mexico border in Texas, a customs dog signaled the presence of narcotics. The compartment was searched by removing the front seat, a rubber mat, and a metal plate secured by screws, and cocaine was discovered. As in the case sub judice, the defendant claimed that he did not know that there was cocaine in the compartment. This court held that the jury could infer from the value of the cocaine, $5 million wholesale, that the defendant would not have been entrusted with it if he were without knowledge of its existence and

importance.[3] In Aguila-Reyes, the defendant claimed that the purpose of his trip was to pick up Toyota pick-up trucks in Miami, Florida. This court stated that the defendant must have been aware that Toyota trucks could be purchased closer than Miami, and that it was reasonable for the jury to infer that the defendant should have known that his trip "was prompted for some additional, probably illegal, reason." Id. at 157. The court also stated that a false

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[3] In the case sub judice, there was testimony that the 110 pounds of 95 percent pure cocaine had a retail value after dilution of $30 million, but a wholesale value of only $500,000. In contrast, in Aguila-Reyes, the street, or retail value of the 30 pounds of cocaine was claimed to be $20 to $40 million, and the wholesale value $5 million. The court in Aguila-Reyes stated that this inference, although permissible, would be insufficient alone to support a finding of guilty knowledge. We agree, and therefore give it little weight in our evaluation of the sufficiency of the evidence against appellant.

statement made by the defendant to customs officials could be considered by the jury in determining whether the defendant had knowledge of the presence of the cocaine.

Applying the same analysis to the case sub judice, appellant admitted to being aware that the airplane could have been serviced in El Salvador or Guatemala, which would have at least raised suspicion in his mind were he without knowledge of the real purpose of the trip. Appellant also misrepresented the registration number of the airplane to authorities in Veracruz. The defendant's conviction in Aguila-Reyes was upheld on little more evidence than this, whereas in appellant's case, there was the significant evidence that 125 pounds of cocaine in the airplane would have come to the attention of the pilot. Although we might have reached a different result had we been the jurors in this case, the evidence

was clearly sufficient for the jury to have found appellant guilty beyond a reasonable doubt on the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it.[4]

B. The Conspiracy Counts:

Appellant argues that the granting by the district court of his brother's motion for a directed verdict of acquittal requires a reversal of his conviction on the

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[4] Although appellant does not attack specifically his conviction of intending to distribute the cocaine, we note that "[i]ntent to distribute a controlled substance may be inferred solely from possession of a large amount of the substance. The purity and value of the substance also are relevant to the possessor's intent to distribute." United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir. 1986) (citations omitted). Here, appellant was in possession of 110 pounds of 95 percent pure cocaine with a retail value of $30 million. The evidence amply supports a finding that if appellant possessed the cocaine, he intended to distribute it.

conspiracy counts because his brother was the only alleged known conspirator, and there was not evidence from which the jury could infer that unknown others conspired with appellant. The indictment alleged that appellant conspired with his brother and "with other persons unknown." We conclude that there was evidence from which the jury could have concluded that other persons participated in loading the cocaine into the airplane and that others would distribute the cocaine. This evidence was supplied by the appellant's own fingerprinting experts who testified that they discovered fingerprints on the bags containing the cocaine, but that these fingerprints did not match either appellant's or his brother's. Hence, the jury could logically infer that those unidentified fingerprints belonged to an unknown conspirator who loaded the bags onto the airplane. Furthermore, appellant

testified that he was going to deliver the airplane to Houston, and then proceed on a commercial airline to Florida. The jury could have inferred from this testimony that the appellant was only the pilot in the cocaine importation and distribution scheme, and that once his role was completed, others would attend to the distribution of the drug. Given this circumstantial evidence that others were involved in the scheme, we think that the jury could conclude beyond a reasonable doubt that appellant conspired to import and possess cocaine with intent to distribute it.

Appellant also argues that the evidence was insufficient to support his conviction on the conspiracy counts because it failed to prove beyond a reasonable doubt that he knew of the existence of each conspiracy and voluntarily joined and participated in them. "In drug conspiracy cases, the government

must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Williams-Hendricks, No. 86-2070, slip op. 1181, 1187 (5th Cir. Nov. 19, 1986). The government need not prove the elements of a conspiracy by direct evidence; circumstantial evidence can be used to show the existence of a conspiracy. Id. at 1188. As we held above, there was evidence from which the jury could have concluded that others were involved in the importation and distribution of the cocaine, so the jury could have found the existence of a conspiracy. Looking at the circumstantial evidence in this case, and accepting the jury's finding that appellant knowingly imported and possessed the cocaine with the intent to distribute it, we think that the jury could have concluded beyond a

reasonable doubt that appellant knew of the conspiracy and, by his conduct in importing and possessing the cocaine, knowingly and voluntarily joined it. Hence, we conclude that the evidence was sufficient to support appellant's conviction on the conspiracy counts.

C. Amendment of the Indictment:

Appellant argues that at the time that he agreed to amend the indictment, he assumed that it could legally be done, but that he held this assumption in error. Appellant now argues that it was legally impossible to amend the indictment, and that, as a result, there was a fatal variance between the indictment and the evidence offered at trial. Under the Federal Rules of Criminal Procedure, a defendant may waive indictment in all but capital offenses. See Fed. R. Crim. P. 7(a). "An offense which may be punished by

imprisonment for a term exceeding one year may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and his rights, waives in open court prosecution by indictment." Id. 7(b). We hold that in this case appellant effectively waived indictment by agreeing to the amendment of the indictment in the proceeding before the magistrate. Had appellant insisted on resubmission of the indictment to the grand jury, he would have the right to be reindicted. Instead, appellant affirmatively waived that right, and cannot argue after conviction that the indictment was fundamentally defective. Hence, we hold that the defendant waived his right to be prosecuted by indictment and that the amended indictment constituted a valid information under which appellant was prosecuted. See id. 7(c)(1).

D. The Jury Instructions on Possession:

Appellant argues that the district court committed reversible error in instructing the jury that they could infer possession from the fact that a person is in control of a vehicle or an airplane, and that this instruction amounted to a directed verdict on appellant's defense of lack of knowledge that the cocaine was aboard the airplane. This argument fails to distinguish between a permissive inference and a mandatory presumption, and we reject it. Cf. United States v. Ferro, 709 F.2d 294, 296-97 (5th Cir. 1983) (approving instruction that the jury may infer knowledge that property is stolen and participation in the theft from unexplained possession of recently stolen property). In

this instruction,[5] the district court made it clear that the jury had to be convinced beyond a reasonable doubt that appellant knowingly and willfully possessed the cocaine. The jury was therefore free to accept or reject the inference that appellant's control over the airplane

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[5] The district court's instruction provided:

> I was telling you about possession. And I was also telling you, my recollection is, for example, you can infer a person has possession over something if he has control over it. For example, he is the driver of a vehicle or the pilot of a plane or the like. But do not forget that before you can find a person guilty of having something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter....

constituted possession of the cocaine.[6] Hence, we conclude that the district court did not improperly direct a verdict against appellant on the issue of whether he knowingly possessed the cocaine.

E. Failure to Give Appellant's Requested Instruction:

Appellant argues that the district court erred in failing to grant his requested instruction that the jury must

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[6] This court has held that "[o]ne who owns or exercises dominion or control over a motor vehicle in which a contraband substance is concealed may be deemed to possess the contraband." United States v. Williams-Hendricks, No. 86-2070, slip op. 1181, 1185 (5th Cir. Nov. 19, 1986) (quoting United States v. Vergara, 687 F.2d 57, 62 (5th Cir. 1982)). Hence, we think that the district court's instruction was a correct statement of the law and that the jury could infer from the appellant's exercise of control over the airplaine that he constructively possessed the cocaine. Of course, as per the instruction, the government was also required to prove that the defendant knowingly possessed the cocaine.

return a verdict of "not guilty" if they have a reasonable doubt that appellant knew that the cocaine was aboard the plane. We think that the district court did not err in refusing to grant this instruction. The refusal by a trial judge to deliver a requested instruction constitutes reversible error only if three conditions are met:

> (1) the instruction is substantively correct;
>
> (2) it is not substantially covered in the charge actually given to the jury; and
>
> (3) it concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively.

United States v. Hunt, 794 F.2d 1095, 1097 (5th Cir. 1986). We hold that appellant is unable to meet the second prong in the above test. The jury instructions clearly stated that the prosecution was required to prove

beyond a reasonable doubt that appellant knowingly imported the cocaine and knowingly possessed it with the intent to distribute it. Under the instructions given, if the jury had a reasonable doubt that appellant had knowledge that the cocaine was aboard the airplane, they would have had to acquit him. Hence, appellant's requested instruction would have been redundant. The district court's instructions properly placed the burden of proof on the element of knowledge on the government, and additional instructions on this issue were not required.

F. Alleged Prosecutorial Misconduct in the Closing Argument:

Appellant argues that the conduct of the prosecutor in the closing arguments constituted reversible error, and that the district court erred in failing to grant his

motion for a mistrial and in failing to sustain his objection to one of the arguments. In order to understand the basis for appellant's argument, it is necessary to digress somewhat. Prior to trial, appellant sought a motion in limine and an order for notice by the government of the intention to rely on evidence of other crimes. Appellant had made many flights into the United States, and wanted to avoid any inference that he might have been smuggling narcotics on those occasions. The district court granted the motion, and instructed the government that it could not make any reference to extraneous offenses or similar acts of appellant or his brother without first approaching the bench. In his closing argument, the prosecutor made a reference to "airplanes," arguably inviting the jury to infer that appellant brought cocaine into the United States on his numerous other

trips to this country. Appellant objected, and the district court immediately instructed the jury that they were to consider only the evidence in the case. Appellant then moved for a mistrial, which the district court denied.[7] Although we

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[7] The entire exchange is set out below:

MR. WOLFE:

.....

I will tell you right now, in this country we have got a cancer and it is called "cocaine." It might be painful for you, but you have got to go in there and you have got to take out that scalpel and you have got to cut it out. If you don't cut it out, ladies and gentlemen, it is going to grow and grow until it consumes us all. And he is the virus that spreads it through his airplanes.

MR. CONNORS: I object, Your Honor, that was in the plural. Seems to infer something about similar acts.

MR. WOLFE: I thought he said he had flown several airplanes, ladies and gentlemen.

think that this argument was improper, in that there was no evidence that appellant carried cocaine in any other airplane, we

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(continued)

MR. CONNORS: Would the Court --

MR. WOLFE: He spreads --

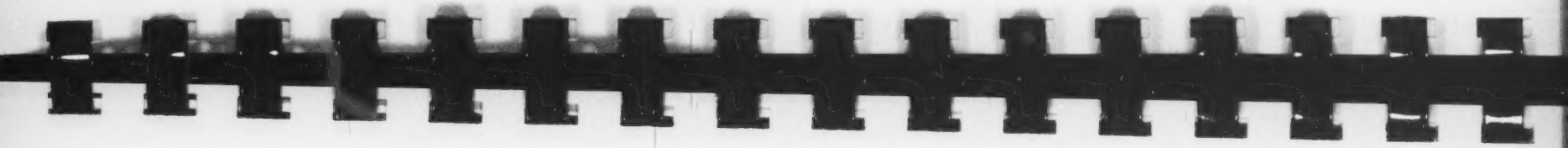
THE COURT: What is your objection, please?

MR. CONNORS: The insinuation is, he is spreading cocaine on more than one airplane, Your Honor. And he is forgetting about knowingly, but he is saying numerous airplanes.

THE COURT: If any reference is made to any matters not regarding the evidence in this case, you are to completely and totally disregard it. We are not trying anything else except what's in the indictment and what was presented to you as evidence in this case. Any reference or intimation that is made to the contrary, you are to completely and totally disregard it. Those are my instructions to you.

MR. CONNORS: Then I respectively move for a mistrial.

THE COURT: Denied.



decline to reverse in light of the district court's prompt curative instruction. See United States v. Cardenas, 778 F.2d 1127, 1132 (5th Cir. 1985); United Stated v. Frascone, 747 F.2d 953, 957-58 (5th Cir. 1984); United States v. Shackelford, 709 F.2d 911, 913-14 (5th Cir.), cert. denied, 464 U.S. 899 (1983).

Appellant also argues that the district court erred in failing to sustain his objection to the prosecutor's closing argument that if the defendant was acquitted, he would be able to make up for the loss of the airplane and the cocaine "on his next trip."[8] We think that this argument was a fair response to appellant's closing argument that the real smugglers could afford to lose the airplane and this shipment of cocaine, and that the district court was correct in overruling appellant's objection. Hence, we hold that the

[8] This argument is set out in full:

MR. WOLFE: He is spreading this virus through his airplane TG-BEQ. Fortunately we stopped him. But if you let him go, like Mr. Connors, said, he only lost $30,000 and half-a-million. And on his next trip, if he gets through, he can make it up. That's what Mr. Connors told you.

Thank you ladies and gentlemen.

MR. CONNORS: I object to the last three sentences. I never told the jury that, Your Honor.

THE COURT: Overruled.

prosecutor's closing arguments did not amount to reversible error. See United States v. Strmel, 744 F.2d 1086, 1089-90 (5th Cir. 1984).

G. The Special Parole Term:

Appellant also argues that the district court erred in imposing a special parole term at the sentencing hearing. As noted above, the special parole term, for whatever reason, was not incorporated into the final judgment of the district court. The rule in this circuit, however, is that "where there is a conflict between the oral and the written versions of a sentence, the former is controlling." United States v. Clark, 741 F.2d 699, 707 (5th Cir. 1984); see also Schurmann v. United States, 658 F.2d 389, 391 (Former 5th Cir. Unit A Oct. 1981). Turning to the special parole term, it is clear that it is not authorized by the

statutes under which appellant was convicted, see 21 U.S.C. §§ 841(b)(1)(A)(ii) and 960(b)(1)(B), and at oral argument the government stated that it did not contend that a special parole term should have been imposed. See also United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986) (holding special parole term not authorized under the 1984 amendments to 21 U.S.C. § 841). We agree with both the government and appellant that the special parole term was unauthorized, and hold that the special parole term is not a part of the judgment of conviction.

H. Other Arguments:

Finally, appellant argues that this court should not invoke the concurrent sentence doctrine to pretermit review of the sufficiency of the evidence issues previously discussed, and that this court

should abandon the concurrent sentence doctrine. Since this court has not invoked the concurrent sentence doctrine in this case, we decline to address these arguments.

III.

For the above reasons, we AFFIRM Gonzalez-Calles' conviction.

United States of America vs. ROBERTO ANTONIO GONZALEZ-CALLES DEFENDANT	United States District Court for the SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION DOCKET NO. B-86-49-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date May 15, 1986

COUNSEL

X WITH COUNSEL Joseph A. Connors, III

PLEA

X NOT GUILTY on February 20, 1986.

FINDING & JUDGMENT

There being a verdict of
X GUILTY.

On April 10, 1986, to Counts 1, 2 3 and 4 Defendant has been convicted as charged of the offense of conspiracy to import a quantity of cocaine, in violation of Sections 963, 952(a), and 960(b)(1), Title 21, United States Code on Count 1; importing approximately 125 pounds of cocaine, in violation of Sections 952(a) and 960(b)(1), Title 21, and Section 2, Title 18, United States Code on Count 2; conspiracy to possess, with intent to distribute, a quantity of cocaine, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title

21, United States Code, on Court 3; and possess, with intent to distribute, approximately 125 pounds of cocaine, in violation of Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United States Code on Count 4 of the Indictment. OFFENSE COMMITTED: January 18, 1986.

SENTENCE OR PROBATION ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten years as to Count 1; Ten years as to Count 2, to run concurrently to Count 1; ten years as to Count 3, to run concurrently to Counts 1 and 2; Ten years as to Count 4, to run concurrently to Counts 1,2, and 3.

The Court further imposes a $50.00 special monetary assessment pursuant to 18 USC 3013, as to each of Counts 1, 2, 3, and 4, for a total of $200.00.

APPROVED AS TO FORM:
/s/ Alfred Crixell

COMMITMENT RECOMMEND-ATION	The court orders commitment to the custody of the Attorney General and recommends, that the defendant be housed at the Tallahassee Federal Correctional Institute in Tallahassee, Florida.

Signed by
X U.S. District Judge:
/s/ Filemon B. Vela
Honorable
Filemon B. Vela

Date 5/26/86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA *

vs * CR. NO. B-86-49

ROBERTO ANTONIO
GONZALEZ-CALLES *
CARLOS BENJAMIN
GONZALEZ-CALLES *

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT 1

That from on or about January 16, 1986, to on or about January 18, 1986, within the Southern District of Texas, and elsewhere, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully import into the United States from a place outside of

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the United States a quantity of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, in violation of Sections 963, 952(a) and 960(b)(1), Title 21, United States Code.

COUNT 2

That on or about January 18, 1986 within the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES did knowingly and intentionally import into the United States from a place outside of the United States approximately 125 pounds (gross weight) of cocaine ~~marihuana~~, a controlled substance under Schedule II of the Controlled Substancs (sic) Act of 1970, contrary to Sections 952(a) and 960(b)(1), Title 21, and Section 2, Title 18, United States Code.

COUNT 3

That from on or about January 16, 1986, to on or about January 18, 1986, within the Southern District of Texas, and elsewhere, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES knowingly and intentionally did combine conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute, a quantity of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title 21, United States Code.

COUNT 4

That on or about January 18, 1986, within the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES did knowingly and

intentionally possess, with intent to distribute, approximately 125 pounds (gross weight) of cocaine, a controlled substance under Schedule II of the Controlled Substances Act of 1970, contrary to Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United States Code.

A TRUE BILL:

/S/
FOREMAN OF THE GRAND JURY

HENRY K. ONCKEN
UNITED STATES ATTORNEY

/S/ Jack Wolfe
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL
	§	NO. B-86-049
ROBERTO ANTONIO	§	
GONZALEZ-CALLES	§	
CARLOS BENJAMIN	§	
GONZALEZ-CALLES	§	

ALL DEFENDANTS' MOTION IN LIMINE AND FOR NOTICE BY THE GOVERNMENT OF THE INTENTION TO RELY UPON OTHER CRIMES EVIDENCE AND FOR A CONTINUANCE UNTIL SUCH NOTICE IS GIVEN WITH SUPPORTING MEMORANDUM

TO THE HONORABLE JUDGE OF SAID COURT:

ROBERTO ANTONIO GONZALEZ-CALLES and CARLOS BENJAMIN GONZALEZ-CALLES, the accuseds herein move this Court for an order.

A. Directing the government, prior to trial, to give notice of its intention to use evidence of any accused's "other crimes, wrongs or acts" in the

trial of this case and to specify what particular accusations will be made and identifying the witnesses it intends to rely upon at trial to prove these matters.

B. To instruct the attorneys and any and all Government witnesses to refrain from mentioning, directly or indirectly, in any manner whatsoever, any extraneous offense of which this accused is not charged explicitly in the allegations of the Indictment herein, without the Government attorney first approaching the bench with this accused's attorney and obtaining a ruling from the Court, outside the presence and hearing of the Jury, in regard to any asserted theory of admissibility of any such extraneous offense(s). As a basis for this motion, this accused maintains

that to allow mentioning of any extraneous offenses without prior ruling of the Court on its admissibility would unduly prejudice the accused before the jury herein.

C. In support of said motion, this accused says:

1. In an effort to prove the elements of the offense(s) charged, the government may introduce evidence of other acts and/or wrongs aside from those alleged in the Indictment.

2. The granting of this motion for disclosure would reduce the potential of prejudice to this accused from surprise use of such uncharged evidence.

3. The granting of this pre-trial motion will also assist the court in making timely pre-trial determinations of admissibility, in avoiding the dangers

of unfair prejudice, of confusion of the issues and of misleading the jury and, finally, in minimizing undue delay, waste of time, or needless presentations of cumulative evidence during the course of the jury trial.

4. NOTICE: This accused under the Fifth and Sixth Amendments to the United States Constitution is entitled to due process and to advance notice of the charges against which he must defend himself. If, in proving those charges, the prosecution reasonably anticipates that it may be using evidence of extraneous similar acts or evidence of other crimes not in the charging instrument, then this accused will have no prior notice of them unless notice is given at this time. Further, lack of notice will constitute a denial of this accused's

constitutional right to notice under the United States Constitution.

5. EFFECTIVE ASSISTANCE OF COUNSEL: Should the prosecution be allowed to introduce evidence of other crimes or extraneous similar acts in this cause, then this court will charge the jury, by instruction, that they may not use that evidence of the extraneous similar acts unless they find the accused guilty of those offenses beyond a reasonable doubt. The effect of that instruction is to litigate that issue. In order to fairly litigate that issue, the accused must be entitled to the effective assistance of counsel in litigating that issue. The accused must reasonably be given the opportunity to persuade the jury that the accused is not guilty of the extraneous similar

acts beyond a reasonable doubt. By failing to give the accused notice of the extraneous similar acts, if any, which the prosecution reasonably may introduce in this cause, the prosecution and this court are depriving the accused, in addition to notice and due process, of the effective assistance of counsel which in (sic) his right under the Fifth and Sixth Amendments to the United States Constitution.

6. THE RIGHT TO PRESENT DEFENSIVE EVIDENCE: It is fundamental under the Sixth Amendment of the United States Constitution that the accused has the right to present defensive evidence. Chambers v. Mississippi, 404 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). When the prosecutor tries to prove the guilty of any extraneous similar acts

beyond a reasonable doubt, then under Chambers v. Mississippi, the accused would be entitled to present defensive evidence in his own behalf to show the fact finder that he is not guilty of that offense. In order to prepare and to gather that defensive evidence, this accused must have notice of that extraneous similar acts evidence in advance of trial. Deprivation of that notice would make it impossible for this accused to prepare or to present the varied defensive evidence which is his right to so do under the United States Constitution.

7. CONFRONTATION: Under the Sixth Amendment to the United States Constitution, the accused is entitled to confront and cross-examine his accusers. If the prosecution chooses to litigate the issue of the

extraneous similar acts, namely, whether the accused is guilty of similar acts offense(s) beyond a reasonable doubt, which the fact finder must find before it can use such evidence, then the accused must be able under the Sixth Amendment to intelligently confront and cross-examine the accusers on that separate charge. If the accused is given no notice of that charge, then not only is his right under the Sixth Amendment to notice denigrated as well as the effective assistance of counsel, as well as his fundamental right to present defensive evidence, but, in addition, his absolute right to confront and cross-examine his accusers is severely undercut by his lack of any opportunity to prepare for such cross-examination.

8. CONTINUANCE TO SECURE RIGHTS: If the accused is not given notice of the additional extraneous offenses which the prosecutor, in good faith, reasonably believes or intends to litigate at trial, then this accused will be forced to move this court for a continuance under the Fifth and Sixth Amendments to the United States Constitution in order to obtain both due process and notice of and defensive evidence concerning the additional unindicted charges, to secure the effective assistance of counsel in litigating the issue of this accused's guilt of the additional charges beyond a reasonable doubt, to secure his Sixth Amendment right to present defensive evidence, and to prepare adequately to intelligently

cross-examine the accusers about the additional crimes.

9. UNNECESSARY TRIAL DELAY: If at trial, in order to secure these rights, the trial court agrees that this accused is entitled to a continuance, then the trial will be delayed unnecessarily. That result can easily be avoided by notice to the accused at the pre-trial hearing of additional crimes which the prosecution, in good faith, reasonably expects it may attempt to prove at trial.

10. Thus, the accused moves this court to grant a continuance of this case until such time as the prosecutor provides the above-referenced information reasonably requested in this case so that this accused will not be "convicted after less than the meticulously fair trial that the

Constitution demands." Gannett Company, Inc. v. Depasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

SUPPORTING MEMORANDUM

In order that this accused not be subjected to a "trial by ambush, in violation of the spirit of the rules", United States v. Kelly, 420 F.2d 26, 29 (2nd Cir. 1969) [where the conviction was reversed with the Court condemning such tactics], and to prevent the introduction of "other crimes" evidence which should not intrude upon this accused's trial, and to head off time-consuming and potentially prejudicial contests over admissibility before the jury, this accused seeks pre-trial disclosure of the government's intention to rely upon such troublesome evidence. The right of the accused to be

advised of such evidence prior to trial arises from basic rights to notice of the nature and cause of the accusation, to prepare a defense, to confrontation of witnesses, to effective assistance of counsel, and to due process of law itself; guarantees made by the Fifth and Sixth Amendments to the United States Constitution. These guarantees will be hopelessly frustrated if the accused does not receive notice of such evidence until it is offered against him at trial. United States v. Baum, 482 F.2d 1325 (2nd Cir. 1973).

In Baum, a conviction for possession of stolen goods was reversed where the trial court denied a defense motion for the names, addresses and telephone numbers of all Government witnesses which the prosecution intended to call, together with any record of prior felony conviction. The

Court stated, 482 F.2d at 1331-1332 (footnote omitted):

> "Confronted for the first time with the accusation of prior criminal conduct and the identity of the accuser, the defendant had little or no opportunity to meet the impact of this attack in the midst of trial. This precarious predicament was precipitated by the prosecutor."
>
> *****
>
> "It is the duty of the government to present its case against the defendant fairly. Little can be added to Justice Traynor's statement—'A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense.'
>
> "The failure to reveal Greenhalgh's identity until he was presented as a witness, confronted the trial judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned, and called for the reversal in United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969). In the language of Judge Smith 'The course of the

> government smacks too much of a trial by ambush, in violation of the spirit of the rules.' To be sure, Baum's attorney did not make a very forceful showing in the district court of what cross-examination or rebuttal material he could secure. But in a case so close as this, we would rather give the defendant the benefit of the doubt than let the Government reap even a slight possibility of benefit from what we regard as a lack of candor unworthy of a prosecutor.
>
> "Here, no reason for nondisclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. Cf. Rovario v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); United States ex rel Wilkins, 326 F.2d 135, 140 (2d Cir. 1964). We hold a new trial is required to afford the defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment."

Similarly, in Riggs v. United States, 280 F.2d 750, 753-754 (5th Cir. 1960), the Court reversed the conviction and strongly condemned nondisclosure of a transaction

not included in the indictment but "saved to be used as a surprise knockout blow ***** and as the record plainly and affirmatively shows, the defendant was deprived of a fair trial by the cloak and dagger manner of getting this surprise testimony into evidence ...."

There is much to be learned from the way State jurisdiction handle these problems. The Supreme Courts of several States have observed the pernicious tendencies of "other crimes" evidence and decreed special notice provisions and other safeguards. State v. Prieur, 277 So.2d 126 (La. 1973); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965). The Oregon Supreme Court stated the necessity well when it said over sixty-six years ago, in State v. Jensen, 70 Oreg. 156, 158, 140 P. 740, 741 (1914):

> "To allow such testimony is to infringe the constitutional right of the defendant to demand the nature and cause of the accusation against him. Such procedure might be palliated if there was any provision for giving the defendant notice of the other charges in such cases; but it is utterly repugnant to justice and fair play to accuse a person of a stated crime and make that the excuse for what is really trying him for a number of others by springing them unheralded upon the attention of the jury to produce a verdict of guilty which might not result except for the bias thus imparted to the minds of the jurors."

This court, as well as this accused, has a stake in pre-trial disclosure of the intention to interject other crimes evidence into the trial. Admissibility under Rules 404(b) and 403, Federal Rules of Evidence, ordinarily poses serious questions of evidence which may delay the proceedings if litigated during the course of the trial. Moreover, if the government is allowed to spring other crimes evidence

during the trial, mid-trial continuances may be necessary in the interest of justice to allow the accused fair opportunity to meet the evidence. Finally, erroneous admission of other crimes evidence remains a common source of mistrials, appeals and retrials. Thus, it is very much in the interests of sound judicial administration to require pre-trial notice of the intention to use other crimes evidence and to resolve admissibility, to the greatest extent possible, before the jury is exposed to voir dire examination and to opening statements. See generally, 2 Weinstein's Evidence ¶404[1] at 404-13 and 404-14 (1980). Thus, in fairness to the accused and to the trial court, the foregoing motion should be granted. E.g., United States v. Stofsky, 409 F.Supp. 609, 620 (S.D.N.Y. 1973), aff'd., 527 F.2d 237 (2d

Cir. 1975), cert. denied, 429 U.S. 819 (1976).

Respectfully submitted,

/S/Joseph A. Connors III
JOSEPH A. CONNORS III
ATTORNEY FOR R. A. GONZALEZ-CALLES
State Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

/S/Fidencio M. Guerra, Jr.
FIDENICO M. GUERRA, JR.
ATTORNEY FOR C. B. GONZALEZ-CALLES
State Bar No. 08580500
McAllen, Texas 78502-4227
(512) 682-1465

THE COURT: Overruled.

You want to stand up a minute. Stand up and I will talk to you. Stand up in place. Let me tell you what takes place at this time while you are standing.

You have already heard the evidence and arguments of the attorneys. It now becomes incumbent upon me being the Judge of the law to give you your instructions, what we call the charge of the Court. The charge of the Court is the law by which you will be governed in your deliberations. That's simply what the Court's charge is, and that is what is going to be taking place now.

It is my duty at the end of the trial to instruct you on all the law applicable to the case. You as jurors are Judges of the facts. But in determining what

happened in this case, on ther (sic) words, in reaching your decision as to the facts, it is your sworn duty to follow the law that I am about now to define to you.

I think you may be seated now. You will be more comfortable.

And, folks, you have to follow all of my instructions as a whole. You have no right to give special attention or disregard to any one of my instructions or to question the wisdom or correctness of any rule of law I may state to you. In other words, do not substitute your own notion or opinion as to what the law is or what the law ought to be. When you and I become Judges, when we take that oath, we are bound by the law whether we agree with it or disagree with it. It is your duty to apply the law as I give it to you regardless of the consequences.

By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or without sympathy. Remember we said evidence in a case is what came from this witness stand here as well as any exhibits that are admitted into evidence. That's a promise you made when you took your oath as jurors. And both sides in this case have a right to expect no less of you.

The indictment or formal charge against the defendant is indeed no evidence of guilt. The defendant is presumed by law to be innocent. The law does not require a defendant to produce any evidence or to prove his innocence or produce any evidence at all. The Government has the burden of proving him guilty beyond a reasonable doubt. If you are not satisfied from the evidence that the Government has met its

burden, then you should find the defendant guilty -- rather not guilty. You must acquit him.

Now, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Government's proof exclude all doubt. For I suppose humanly speaking it is impossible for anybody to prove to another human being anything beyond all possible doubt. What is required is that the Government's proof exclude any reasonable doubt concerning the defendant's guilt. And a reasonable doubt is a real doubt. It is based upon reason and common sense after careful and impartial consideration of the evidence in the case. The Government's burden is to prove the defendant guilty beyond a reasonable doubt. If it fails to do so, you must find the defendant not guilty.

And proof beyond a reasonable doubt is proof of such a convincing character that you would be willing to act and rely upon it without hesitation in the most important personal matters of your own. If you are satisfied from the evidence that the Government has met its burden, simply say so. If you are not satisfied, likewise simply say so.

Remember that I told you that what the attorneys said to you in their opening statements as well as what they said to you in their final arguments was not evidence. I told you at the outset of this case that I did not have an opinion about the case, although under our rules I might be able to express my opinion. It was not my intention to do anything whatsoever during the course of this trial to lead you to believe that I had an opinion. If I did so, then I am going to ask you at this time

to completely and totally disregard it, for I do not want to in any way take a part what is exclusively yours in your capacity as Judges of the facts in this case. Now, while you should consider the evidence in this case, just like the attorneys did in their final arguments, you are permitted to draw such reasonable inferences from the testimony and exhibits that you feel are justified in the light of common experience. In other words, you can make deductions and reach conclusions which reason and common sense lead you to believe from the facts that have been established by the evidence in the case.

You can consider two kinds of evidence. You can consider direct evidence or circumstantial evidence.

Direct evidence is eye-witness testimony. I saw such and such a person do

such and such a thing or I did such and such a thing.

Circumstantial evidence is a chain of events or circumstances which indicate that a person is either guilty or innocent.

You noticed during the course of this case that there was testimony regarding fingerprints.

You know on the window sill of the house that was burglarized they found some fingerprints. Nobody saw those fingerprints get there, but the fact that they are there is circumstantial evidence that there was an individual there.

Before you go to sleep you look out your back window and your lawn is dry. You go to sleep and wake up the next day at 7:00 o'clock the next morning and there are four inches of water on there. You didn't see the water get on there, but the fact that the water is on your lawn is

circumstantial evidence that something happened during the course of the night to get the water on there.

What is important to remember is, that the law does not distinguish between direct and circumstantial evidence and it leaves it to you to decide what weight to give either direct or circumstantial evidence that was presented during the course of this trial. That is exclusively within your province. You decide what weight to give any type of evidence that was submitted to you.

And I said to you, you have got to consider all of the evidence in this case. Did I ever tell you that you had to believe it? I never told you that you had to believe it, did I? Because you see you are the sole judges of the believeability and credibility of the testimony of the witnesses that came before you. You decide

what weight you want to give the testimony of any witness.

Now, how do you do that? I guess we search and we look for every human experience that we've ever had. Here are some things you should take into consideration. For example, in weighing the testimony of a witness you should consider their relationship to the Government or the defendant; you should consider whether or not the witness that came before you had an interest in the outcome of the case; the manner that that witness testified before you; the opportunity that that witness had to observe or acquire knowledge about the facts to which he or she testified; their candor; their frankness, their fairness, their intelligence, and the extent to which they have either been supported or contradicted by other credible evidence.

You may in short accept or reject in whole or in part the testimony of any witness. You can believe all of what a witness said, half of what a witness said or none of what he said.

And it doesn't make any difference if more witnesses came here to testify to one matter as opposed to a smaller number to the contrary. You decide what weight to give the testimony of any number of witnesses.

We attorneys like to use the words "discreditation" or "impeachment." And that simply means this, if it happened in this case, that there may have been in the course of this trial a showing that a witness came before you who testified falsely or contrary concerning a material matter or by evidence that at some other time the witness had said or done something or failed to say or do something which is

different than the way they testified or said they had done or not done things here before you. If that happened during the course of the trial that's what we call impeachment. If a person was so impeached, then here again it is your exclusive province to give the testimony of that witness such credibility you think it deserves. That's your authority.

We also had some expert witnesses who came here to testify before you. The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and come here and state his or her opinion to you in those matters.

Listen to this: You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you can disregard the opinion entirely even of an expert witness.

Then we come to some very important terms. Important terms because they are essential ingredients. They underlie the way we do things in this country. For a person to engage in such conduct that on the face of things it makes that person look like he or she is guilty, but if the person did not have the required state of mind -- and in this case these terms become

very important -- the person didn't have the required state of mind, knowledge or willfully engage in misconduct, you can't find that person guilty.

The first thing I want to define to you is the fact -- you will notice in the indictment the indictment uses the term "on or about" a certain day. The proof doesn't have to establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in this case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged. I don't think that matter is in issue in this case.

Than we come to two very important terms, two very important terms. The word "knowingly." The word knowingly means that the act was done voluntarily and intentionally -- because you wanted to do it voluntarily and intentionally -- and not

by accident or mistake. And then we come to "willfully." And "willfully" means that the act was committed voluntarily and intentionally -- because you wanted to do it -- and purposely and with the specific intent to do something that the law forbids -- and with the specific intent to do something that the law forbids. That is to say, with bad purpose either to disobey or disregard the law. Remember those terms. They are going to be coming back to you.

Now what do you have? In this case you have a four-count indictment. We are going to call Counts 2 and 4 the substantive counts. Counts 1 and 2 allege a conspiracy. Count No. 2 alleges a substantive count or the alleged importation into the United States from another country 125 pounds gross weight of a controlled substance. I will tell you now cocaine is a controlled substance.

That is what they call narcotics. Count No. 4 alleges the knowing and intentional possession, with the intent to distribute, approximately 125 pounds of the controlled substance. In this case it being cocaine.

Let me first define to you what is required before you can find the defendant guilty of either Counts 2 and 4. Then I will come back and define to you what a conspiracy is, because an integral part of a conspiracy entails the fact that there was a scheme to violate a substantive law.

We will start with Count No. 4. Count No. 4 alleges the possession, with intent to distribute, cocaine in the amount alleged in the indictment. It is against the law for anybody to knowingly or intentionally -- remember knowingly and intentionally -- possess, with intent to distribute, a controlled substance. Cocaine is a controlled substance.

Before you can find the defendant guilty of Count No. 4 you must be satisfied from the evidence beyond a reasonable doubt that the defendant knowingly and willfully possessed the cocaine as charged.

And, in addition to that, making references to Count No. 4, in addition to that, you must also be satisfied beyond a reasonable doubt from the evidence that he possessed the substance with the intent to distribute it. And possession with intent to distribute simply means to possess with the intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction. Simply passing it on to somebody else.

Further, I will tell you that you can consider the amount of the controlled substance in question as would regard the

element of the intention to distribute. You can consider that.

Now, if you are not satisfied from the evidence beyond a reasonable doubt that the Government had met its burden in regard to those elements in Count No. 4 you should find the defendant not guilty of Count No. 4.

Then we go to Count No. 2, because Count No. 2 alleges the alleged importation of the controlled substance in question. Well, in order for a person to import he has to be guilty of possession. Now, I am going to define possession to you in a few minutes because we have both actual and constructive possession. And I will simply tell you at this time, you don't have to have something in your hands to be legally in possession thereof because you might have constructive possession thereof. And I will define it for you.

In Count No. 2 it is alleged that the defendant imported into this country the amount of cocaine in question. Simply put, it is against the law for a person to import into the United States a controlled substance. In order for a person to be guilty of Count No. 2, then, he must, of course, have either actual or constructive possession as I am going to define it for you -- and remember the elements of possession -- and bring it into this country.

If you are satisfied from the evidence that the Government has met its burden as would regard Count No. 2 by proof beyond a reasonable doubt, you should find the defendant guilty. If you are not satisfied, you should find the defendant not guilty. Which brings us then to Count No. 1 and 3.

"Conspiracy" is just a big word. It really is. But maybe I can help you by first giving you an example of what a conspiracy is.

Mr. Holloway and I -- by the way, I tell this to every jury -- don't make enough money. Also ask our jurors to write our Congressmen and tell them, too. But that's neither here nor there. So what he and I decide to do, we decide we are going to find a way to get more money. So we go to my office. We don't have a formal meeting. We don't put it in writing. Nobody else is there. And he and I decide that the way we are going to get more money is to rob a National Bank. Robbing a National Bank is a violation of law. All of us know that. Robbing a Federal Bank is a violation of law.

So for the purpose to engage in this scheme we solicit the services of Mr.

Ramirez. Then we ask Mr. Ramirez to go rent a get-away car. The moment that Mr. Ramirez goes to rent that get-away car we have committed a violation of law. We have engaged in a conspiracy.

Doesn't make any difference if we didn't rob the bank. By the same token, if we robbed the bank, it doesn't make us any less guilty. You understand that.

Now, the difference in an ordinary conspiracy and a conspiracy in a case involving narcotics or drugs is that the Government doesn't have to allege the overt act committed by Mr. Ramirez nor prove the overt act that Mr. Ramirez committed.

So you see a conspiracy simply means that two or more persons get together and engage in a plan to violate the law. It is a kind of partnership in criminal purpose in which each member becomes the agent of each other member. The gist or essence of

the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

There are some things that the evidence doesn't have to show you as would regard Counts 1 and 3, that is, the counts on conspiracy.

Count 1 alleges a conspiracy to import into this country a controlled substance. Count 3 alleges a conspiracy to possess it with intent to distribute it.

There are some things the Government doesn't have to prove to your satisfaction beyond a reasonable doubt before you can find the defendant guilty of either Counts 1 and/or 2. What the Government doesn't have to prove to you is not what's important. What is important is what the Government must prove to you.

For example, the Government doesn't have to show you that -- the case need not

show that the alleged members of the conspiracy entered into any expressed or formal agreement -- they didn't have to do that in writing -- or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case doesn't have to establish that all the means or methods discussed or may have been alleged in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their unlawful

objectives. That's what the Government doesn't have to prove.

Here is what the Government must prove to your satisfaction beyond a reasonable doubt before you can find Robert Gonzalez-Calles guilty of Count No. 1 and/or Count No. 3.

That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment. That two or more persons engaged in a plan to violate the law.

In addition to that: That the defendant knew of, intended to join and willfully participated in the conspiracy; that the defendant knew of, intended to join and willfully participated in the conspiracy.

If you are satisfied that the Government has proven those elements to you

as would regard Count No. 1 and/or Count 3 you should find the defendant guilty. If you are not satisfied that the Government has met its burden of proving those matters to you beyond a reasonable doubt, you should find the defendant not guilty of Count No. 1 and/or Count No. 3.

Knowledge, actual participation and criminal intent are the necessary elements of a conspiracy. The Government must prove each of those elements beyond a reasonable doubt.

You can become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion, on one occasion, that is

sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy. In order to establish participation in a conspiracy, the Government must show more than mere presence or association. Just because you are there or just because you associate with persons doesn't make you guilty.

Mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. There must be evidence that the individual defendant had knowledge of the conspiracy. Also, a person who has no knowledge of a

conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator. You must have a knowing and willfull (sic) participation in the event.

In your consideration of the conspiracy offenses as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the defendant under consideration willfully became a member of that conspiracy. I told you that I was going to define "possession." It is not necessary that I have this pen in my hand, in my actual physical possession, for me to be in possession thereof, because the law recognizes two kinds of possession. The law recognizes actual possession, which

is this in my hand, and constructive possession.

Sort of like, for example, you can be in Harlingen, Texas, and send somebody to get something for you in Matamoros. And although whatever he brought from Matamoros is not in your possession, you can lawfully be in constructive possession what he brought from Matamoros. Because, you see, under the law a person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, then that person is considered to have constructive possession thereof. You can also infer the matter of the element of possession from the fact that an individual has control over, let us say, a vessel or a plane or a car or a house. But in order for you to find that a

person has either actual or constructive possession thereof --

You need a recess, ma'am? Take her with you, please. Do any of you want a recess? I am about done.

(Short recess.)

THE COURT: I appreciate she asking. Remember the old days when you used to try cases and people worked until 10:00 or 11:00 o'clock. The Judge didn't recess.

Are you comfortable, ma'am? I am glad you called it to my attention. Don't you worry about it one bit.

Okay. I was telling you about possession. And I was also telling you, my recollection is, for example, you can infer a person has possession over something if he has control over it. For example, he is the driver of a vehicle or pilot of a plane or the like. But do not forget that before you can find a person guilty of having

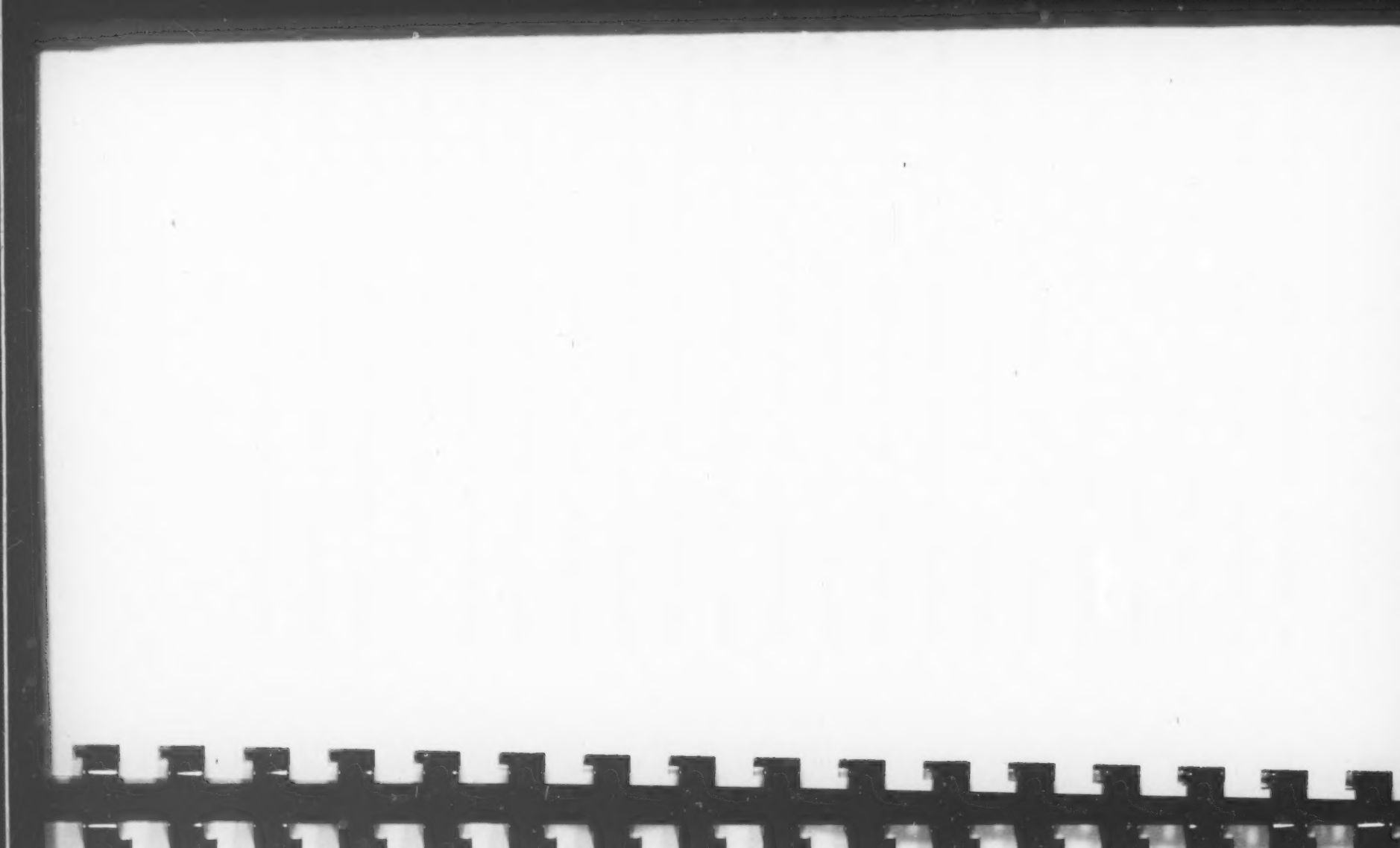
something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter. Please don't forget that. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of at thing possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

Then we come to another matter. I know that you've heard of the law of aiding and abetting. One very good way of introducing the law of aiding and abetting

is simply translate what is commonly used in Spanish: He who holds the cow's leg is just a (sic) guilty who shot it in the head. Because under our laws a person who commits an offense against the United States, if he aids, abets, counsels, commands, induces or procures its commission, that person is just as guilty as the one who actually did it because he helped to accomplish the unlawful objective. So you see the law recognizes that, ordinarily anything a person can do for himself may also be accomplished by him through the direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by him, or if the defendant aids



and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself.

Here again remember this: That before any defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed. And here again, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed

or aided and abetted the crime unless you find beyond a reasonable dbout (sic) that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable dbout (sic) that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant willfully participated in its commission.

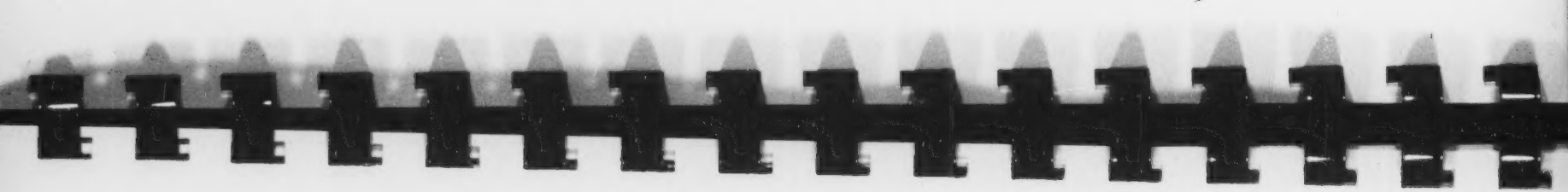
A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine the guilt or

innocence of the accused from the evidence in this case. He is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of anybody else, any other person, not on trial as a defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court or the Judge, and the jury should never consider punishment in any way in arriving at an impartial verdict as to the guilt or innocence of the defendant.

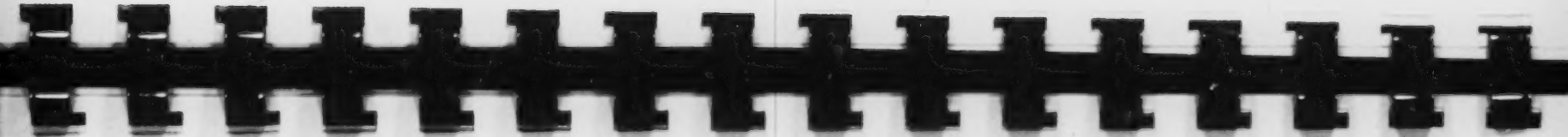
Now, any verdict that you return as to all four counts must be the considered judgment of each juror. In order for you to return a verdict, all twelve of you who will be deliberating must unanimously



agree. There must be unanimous agreement in order to reach a verdict.

It is your duty as jurors to consult with one another in an effort to reach an agreement if you can do so without violence to individual judgment. You have got to decide the case for yourself but you do that after careful and impartial consideration and discussion of all the evidence in the case with your fellow jurors.

And in the course of your deliberations don't hesitate to change your mind if you are honest to goodness convinced you are wrong. For God's sake don't change your mind just simply to reach a verdict in the case or to satisfy your fellow jurors. You are Judges and the only thing you are interested in is in ascertaining and determining the truth.



The first thing you will do when you go to the deliberation room is you will select one of your members as your foreperson. That individual will preside in your deliberations and also will be your spokesperson in the courtroom.

I have prepared a form of verdict which is quite simple. It addresses each count. And has a space for you to insert "not guilty" or "guilty" for each and every one of the counts. Further, a space for the foreperson to sign and, of course, to date the verdict.

You are going to take those into the jury room with you. And when you have reached a unanimous agreement, the foreperson should fill in the blank indicated and then you will be returned to the courtroom so your verdict can be made public.

If during your deliberations you wish to communicate with the Court -- and I am not encouraging you to communicate with me and I am not discouraging you to communicate with me -- I am going to ask that you please do it in writing. Have the foreperson sign it, date it, put the hour on it. And if it is consistent with what your conscience dictates, you continue your deliberations I guarantee you I am not ignoring any communication. I may be in something else or I may be looking for an answer to your communication. But if it is consistent with what your conscience dictates, you continue your deliberations. I will respond as promptly as possible, I'll guarantee you.

Then I am going to ask you to do me one final favor. If you do communicate with me, please don't specify your numerical division. So many one way, so

many another. Please don't do that at any time.

At this point I must give the attorneys an opportunity to address me. It has to be done outside of your presence. I am going to ask that you be taken to the hallway.

Everybody rise and remain in place.

(Jury left courtroom.)

THE COURT: Any objection from the Government?

MR. WOLFE: It is not in the form of an objection. In my opinion sometimes the jurors get confused sometimes as to the verdict. I know the Court was explicit that it must be unanimous. In the Government's opinion they think it is unanimous only to find guilty. They don't think it is unanimous to find not guilty.

I wish the Court would tell them, "Ladies and gentlemen, it takes twelve of

you to find the defendant guilty. It takes twelve of you to find the defendant not guilty."

THE COURT: Maybe we will do it next time. All right, sir. Any objection from the defendant? Remember that everything you have favored me with you preserve your exception thereto.

MR. CONNORS: Your Honor, I have several. Could the Clerk show the Court Carlos' No. 1. You covered about 90 percent of it. I wanted to cover a few paragraphs with you.

THE COURT: That you preserve your exception thereto.

MR. CONNORS: I am not sure the Court did "burden of proof." You remember doing that, Your Honor?

MR. WOLFE: I thought the Court was --

MR. CONNORS: About telling them hesitation in personal affairs.

THE COURT: You mean proof of doubt -- proof beyond a reasonable doubt. The burden of proof.

MR. CONNORS: I don't mean burden of proof.

THE COURT: Proof beyond a reasonable doubt, I most definitely did.

MR. CONNORS: The fact that the indictment is no evidence.

THE COURT: Yes, sir.

MR. CONNORS: That is all --

THE COURT: You preserve your exception thereto.

MR. CONNORS: That's all in Carlos 1. I have several others, Your Honor.

THE COURT: Go ahead. Hurry up.

MR. CONNORS: I would like the Court to charge on the availability of the exhibits. How they obtain them.

THE COURT: They are going to take the exhibits.

MR. CONNORS: I didn't know that, Your Honor.

THE COURT: Except the cocaine. If they ask for it, I will send it to them.

MR. CONNORS: I would ask the Court to charge the fact that Carlos Benjamin is no longer in the lawsuit.

THE COURT: I already have.

MR. CONNORS: Your Honor, Robert Gonzalez' jury instruction No. 15 went to whether he was -- if he was ignorant of the fact cocaine was in the plane, that ignorance of fact goes to the heart of his defense and if --

THE COURT: I think I covered that in my instruction. They were told, if he didn't know about it, he didn't willfully engage in the conduct, they couldn't find him guilty. You preserve your exception thereto.

MR. CONNORS: Your Honor, the fact that there were witnesses not called by the Government or by me, you didn't give it to them in the final charge. You said it during the argument.

THE COURT: I think they have already been instructed.

MR. CONNORS: Your Honor, the Court, as far as I know, did not charge that there is no inference of guilt because the man was arrested, detained or even still in custody. I would ask that you do that. I know I charge on it but I don't count.

THE COURT: The Court did charge them on presumption of innocence.

MR. CONNORS: He testified that he was in jail, Your Honor, on the stand when he saw Victor. He testified he was detained when this happened.

THE COURT: Denied. I think the Court has already covered that on the presumption of innocence.

MR. CONNORS: One other, Your Honor. We would ask -- I guess we object. The Court failed to instruct as follows; that one of the defensive theories was that someone knowingly conspired with others who are not on trial before the jury to frame my client, Robert Antonio Gonzalez-Calles, for the charges in this case. Facts adduced in support of this theory created in the jurors minds a reasonable doubt of guilt of these charges and the jury must find the defendant not guilty.

THE COURT: That will be denied. You will preserve your exception. Any others?

MR. CONNORS: Your Honor, as to similar acts, since there was some insinuations as to similar acts, and finally in jury argument --

THE COURT: I don't remember any evidence to that effect.

MR. CONNORS: Is that one overruled, Your Honor?

THE COURT: Yes, sir.

MR. CONNORS: That is all, Your Honor. We have no further --

THE COURT: You preserve your exception. Bring the jury in. Everybody be seated.

(Whereupon the jury re-entered the courtroom, the alternate jurors were excused and the jury retired to deliberate. At 4:15 p.m. the jury returned its verdict in open court.)

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RELEVANT JURY ARGUMENT (4R. 695-698)

Ladies and gentlemen, out in our neighborhoods and out in the community that we grow up in and live in, I don't have to tell you the effects that drugs has. You know the families that have been affected. You know the lives that have been ruined. You know what it causes. And Mr. Connors says we are not being fair. Do you think --

MR. CONNORS: Your Honor, we are not trying every lawsuit in cocaine in the United States or marijuana or pills.

THE COURT: Confine yourself to matters in this case, Mr. Wolfe.

MR. CONNORS: Is my objection overruled?

THE COURT: Yes, sir. The jury has been instructed accordingly.

MR. WOLFE: You think that he is being fair when he brings this cocaine into the country?

When you go back in the jury room you are going to have to make a tough decision. You are going to have to decide what happened. And it is not going to be easy. I will tell you it is not going to be easy. It never is and it is not supposed to be. That's why we have twelve people here. If it was easy we wouldn't have juries.

But you are an important link in the chain of criminal justice. And the chain is only as strong as its weakest link. When you go in that jury room don't be the weak link. Be the strong link.

The Customs officers have done their job. The Court has done its job. The Government has presented its evidence to you. You be the strong link. You tell the defendant and his associates if they bring cocaine into South Texas that we are going to be waiting for them. And you tell them that no matter how clever they are that

they are not going to escape justice that comes to South Texas with their poison.

When you go back in that jury room, ladies and gentlemen, I know you are going to agonize. In your own life you probably had to make a decision in regards to an operation or something like that. And it is not easy for you or for a family member to make those kind of decisions. It is a tough decision to go into the doctor and go into the hospital and have them take out that scalpel and go in there and cut and remove some cancer.

I will tell you right now, in this country we have got a cancer and it is called "cocaine." It might be painful for you, but you have got to go in there and you have got to take out that scalpel and you have got to cut it out. If you don't cut it out, ladies and gentlemen, it is going to grow and grow until it consumes us

all. And he is the virus that spreads it through his airplanes.

MR. CONNORS: I object, Your Honor, that was in the plural. Seems to infer something about similar acts.

MR. WOLFE: I thought he said he had flown several airplanes, ladies and gentlemen.

MR. CONNORS: Would the Court --

MR. WOLFE: He spreads --

THE COURT: What is your objection, please?

MR. CONNORS: The insinuation is, he is spreading cocaine on more than one airplane, Your Honor. And he is forgetting about knowingly, but he is saying numerous airplanes.

THE COURT: If any reference is made to any matters not regarding the evidence in this case, you are to completely and totally disregard it. We are not trying

anything else except what's in the indictment and what was presented to you as evidence in this case. Any reference or intimation that is made to the contrary, you are to completely and totally disregard it. Those are my instructions to you.

MR. CONNORS: Then I respectfully move for a mistrial.

THE COURT: Denied.

MR. WOLFE: He is spreading this virus through his airplane TG-BEQ. Fortunately we stopped him. But if you let him go, like Mr. Connors, said, he only lost $30,000 and half-a-million. And on his next trip, if he gets through, he can make it up. That's what Mr. Connors told you.

Thank you, ladies and gentlemen.

MR. CONNORS: I object to the last three sentences. I never told the jury that, Your Honor.

THE COURT: Overruled.